No. 22597

United States Court of Appeals
For the Ninth Circuit

L. B. Foster Company, Inc.
Appellant,

vs.

Melvin Hurnblad, and Grace Hurnblad, his wife
Appellees,

Appeal from the United States District Court for the Western District of Washington, Southern Division

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APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

I. REPLY TO APPELLEES' STATEMENT OF THE CASE

Appellees open their brief with the charge that appellant's statement of the case was made in bad faith. The allegation is groundless, and tasteless. Appellant set out in seven pages (App. Br.* pp. 2-8) the facts relevant to the issues presented for review in this appeal fully, fairly and concisely. Since this appeal turns ultimately and singularly on the question of liability of L. B. Foster Co., Inc., only those facts necessary for consideration of that issue are included in appellant's statement of the case. However, appellees add to their version of the case (Ans. Br.

*Herein App. Br. will indicate Appellant's Opening Brief and Ans. Br. will indicate Appellees' Answering Brief.

pp. 3-12) minutia[1], irrelevancies[2], and surprisingly, in light of their charge of bad faith, conclusions and argument based on their version of the evidence.[3] It goes without saying that conclusions drawn by one party, and argument based thereon have no place in the statement of a case. The duty of an appellate advocate is to present his case in the best ethically possible light, but he violates this duty when he attempts to introduce his own conclusions and argument as fact.

Appellees (Mr. and Mrs. Melvin Hurnblad hereinafter referred to in the singular) also include in their statement of the case an allegation of an attempt by appellant (L. B. Foster Co., Inc. hereinafter referred to as Foster) to deliberately mislead this court (Ans. Br. p. 4). Hurnblad quotes out of context a portion of one sentence appearing on page 38 of Foster's brief. He fails to quote the succeeding sentence, (page 38)

> "However, even assuming that Transport Supply was not properly licensed to engage in

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[1]Note on page 3 alone: "1961 Ford"; "sitting in the right front seat"; "controlled by a standard overhead red and green traffic signal."

[2]Appellees go on for four pages (pp. 8-11) reciting everything in the record which would possibly indicate incompetence on the part of *Sim Knight*. This latter material is presented notwithstanding the fact that the only issue presented to the jury by the court was that of the incompetence of *Transport Supply* (R. 164 & 180), and that Appellant's argument was directed specifically to the lack of proof of incompetency of Transport Supply.

[3]Appellees' conclusions disguised as facts *inter alia*: last sentence of incomplete paragraph page 10; the sentence beginning on page 11 running over to page 12. However, the most serious indiscretion occurs on the top of page 5 where Appellees attempt to create the inference that Foster stipulated that it knew at the time of the shipment that the rate involved was below the minimum. Reference to the Pretrial Order (R. 114) shows clearly and singularly that Foster did ship and that it was subsequently billed at an amount less than the minimum. Nothing whatsoever was stipulated and Hurnblad did not prove anything as to Foster's knowledge of the rate prior to the shipment.

an interstate haul, this does not constitute evidence of incompetency."

which negates the effect of Hurnblad's quoted squib. In addition, it should be noted that in order to substantiate his position to any extent, Hurnblad cites to a portion of the transcript which was not even ordered until after Foster's opening brief was filed. Foster had ordered that the transcript should contain "all testimony on the issue of liability relating to all the defendants and the additional defendants" (R. 194). The opening brief was prepared in reliance on the assumption that a conforming transcript had been provided. However, on June 20, 1968, some 14 days after Foster's brief was filed, the District Court forwarded to the Clerk of this Court an Addendum to the Transcript which had been filed only that day (Letter from Harold W. Anderson to William B. Luck, June 20, 1968).

Hurnblad's groundless allegations of bad faith and deliberate misrepresentation need no further answer.

II. REPLY TO HURNBLAD'S ARGUMENT IN SUPPORT OF JUDGMENT

A. FOSTER INCURRED NO LIABILITY BY CONTRACTING WITH TRANSPORT SUPPLY

Appellee Hurnblad begins his argument with a quotation from Restatement (Second), Torts §411 setting forth part of the rule, part of the comment and one of the examples. He concludes from this that the act of shipping done herein was an act frought with inherent danger. This bare conclusion should be compared to Prosser, Torts §70 at p. 486 (3rd ed.

1964) where in discussing the rule that an employer may be liable for the negligence of an independent contractor hired to do a job he states:

> *"One who hires a trucker to transport his goods must, as a reasonable man, always realize that if the truck is driven at an excessive speed, or with defective brakes, some collision or other harm to persons on the highways is likely to occur. But this is not 'inherent danger' as the courts have used the term; and for such more or less usual negligence the employer will not be liable."* (Emphasis added.)

The author distinguishes this situation from Hurnblad's example:

> "When the trucker is to transport over the highway giant logs which require special care to fasten them securely, there is obviously a special danger, and the exception applies."

In this single sentence Prosser points up the derth of reasoning which inflicts all of Hurnblad's argument. Here Hurnblad attempts to take a rule of narrow, specific, pinpoint accuracy and turn it into an all covering blanket. This would make every employer an insurer of each independent contractor which he hires, no matter what the job or what the circumstances. Appellees' protest notwithstanding such is not the law.

1. HURNBLAD FAILS TO DISCERN THE WASHINGTON RULE ON THIS QUESTION

Hurnblad sets out the rule that an empolyer can be held liable for employing an incompetent, and for this he cites some five Washington cases. Foster does not quarrel with this rule. (See App. Br. p. 34.)

Moreover, Hurnblad fails to apprise this court of anything about these cases; he does not quote them as giving voice to any fundamental rationale but apparently is content that the mere naming of the cases will suffice.

The first case cited by Hurnblad is *Richardson v. Carbon Hill Coal Co.* (Wash.), 32 Pac. 1012 (1893) which is officially reported at 6 Wash. 52. It was treated in depth at p. 35 of Foster's brief. Here, while discussing the liability of an employer for engaging an incompetent, the court laid clear a distinction to be drawn between "negligence" and "incompetence." In *Richardson* the court clearly stated that negligence refers to the particular act which gave rise to the instant lawsuit; whereas competency or incompetency refers to the characteristics displayed by the individual antecedent to the act involved.

Hurnblad cites *Green v. Western America Co.,* 30 Wash. 87, 70 Pac. 310 (1902). A portion of the opinion is quoted at p. 36 of Appellant's Brief. This case held that there exists a presumption that an employer has exercised proper care in selection of his help. It further stated that in order to overcome this presumption the attacking party must show either that the employer knew in fact that the contractor was incompetent, or that the contractor had demonstrated his antecedent incompetence by specific acts of such a nature, character and frequency that the employer must have had them brought to his attention.

Appellee Hurnblad also cites *Amann v. Tacoma,* 170 Wash. 296, 16 P.2d 601 (1932). This was a case wherein a building owner had let a contract for the demolition of his building. The contractor made a sub-

contract with another contractor. In the course of demolition, the building front fell on the plaintiffs who were sitting in a parked car on the street in front of the building. On appeal the Washington State Supreme Court reversed as to the dismissal of the two contractors, but affirmed the dismissal of the owner. On the way to this conclusion of no liability on the part of the principal, the court said (16 P.2d at 607):

> "Generally speaking, where the act which causes the injury is one which the contractor is employed to perform and the injury results from the act of performance and not from the manner of performance; . . . or where the work is inherently or intrinsically dangerous in itself, and will necessarily or probably result in injury to third persons, unless measures are adopted by which such consequences may be prevented; and in other like cases — a party will not be permitted to evade responsibility by placing an independent contractor in charge of the work."

The court then noted that the injury resulted not from the act of doing the work, but from the manner in which it was done, and that the work of demolition of a building standing immediately adjacent to a public street was not inherently or intrinsically dangerous.

The other Washington cases cited by appellant are not on point: *H. W. Van Slyke Warehouse Co. v. Vilter Mfg. Co.,* 158 Wash. 619, 291 Pac. 1103 (1930), and *Blancher v. Bk of Calif.,* 47 Wash.2d 1, 286 P.2d 92 (1955).

2. HURNBLAD'S CASES FROM OTHER JURISDICTIONS DO NOT HELP HIS POSITION

Appellee cites some nine cases and five authorities for the proposition that an employer may be held liable for harm proximately resulting from failure to select a competent independent contractor (Ans. Br. p. 15). This seems somewhat superfluous in light of the fact that appellant conceded this point (App. Br. p. 34). Out of this mass of unnecessary authority, Hurnblad selects five cases which he describes as going to the "precise question which we have here".

The first case cited by Hurnblad is from an intermediate appellate court in California, not the California Supreme Court as appellee's form of citation would at first indicate: *Risley v. Lenwell,* 129 Cal. App. 2d 608, 277 P.2d 897 (1954). This is the giant log illustration cited by Hurnblad on page 14 of his brief, and distinguished from the case at bar by Prosser *supra* at page 4. In Restatement (Second) Torts, Reporters Notes §411 it is stated:

> "Illustration 2 is taken from *Risley v. Lenwell,* 129 Cal. App. 2d 608, 277 P.2d 897 (1954)."

In addition, a reading of the case shows that it is clearly distinguishable not only on the law but on the facts. The particular piece of defective equipment used by the independent contractor had been in the employer's yard not once, as Sim Knight was, but half a dozen times over a period of some three weeks and it had been constructed with aid and material from the principal.

Hurnblad also cites *Joslin v. Idaho Times Pub. Co.,* .....Ida....., 91 P.2d 386 (1939). This is clearly in-

apposite as it adopts by way of dictum the minority rule which places the burden of proof on the principal. This is exactly opposite to the rule in Washington as indicated by the *Green* case which places the burden firmly on the plaintiff to come forward with a significant amount of proof in order to overcome the presumption of due care on the part of the principal. See also *Miller v. Mohr,* 198 Wash. 619, 642, 89 P.2d 807 (1939) quoted at App. Br. p. 37.

Hurnblad also cites *Carr v. Merrimack Farmers Exch.,* 101 N. H. 445, 146 A. 2d 276 (1958). Among several rulings the court made was one which held that the transportation of ten tons of hay was not an inherently dangerous activity since that term "implies work that is dangerous even when conducted with reasonable care." In addition, the court specifically refused to hold that the principal had a duty to inspect the load.

Hurnblad cites two cases from Arkansas: *Ellis & Lewis v Warner,* 180 Ark. 53, 20 S.W. 2d 320 (1929) and *Ozan Lumber Co. v. McNeely,* 214 Ark. 657, 217 S.W. 2d 341 (1949). Of significant interest is the *Ozan Lumber* case wherein the court quoted from 57 C.J.S. *Master & Servant* §592:

> "The fact that a contractor is negilgent in respect of the work in question raises no presumption that the employer was guilty of negligence in employing him."

The court concludes its discussion of the law in this area by quoting from the *Warner* case and then stating (217 S.W. 2d at 345):

> "So here, appellant [principal] would be liable if it negligently employed Kirby [independ-

> ent contractor] as an independent contractor *knowing that he was a careless, reckless and incompetent truck driver or operator.''*
> (Emphasis added).

Examination of the *Ozan Lumber* case, cited by Hurnblad on page 15 as supporting his position, shows conclusively that the rule of law developed in appellant's argument (App. Br. pp. 34-41) is the general rule in this country as well as in this jurisdiction. The vital pivotal question always comes up the same: Was the independent contractor shown to be in fact incompetent? Hurnblad had this burden of proof laid on him by the Washington cases beginning with *Richardson, supra* at p. 5 and running through *Miller, supra* at p. 8 (See App. Br. pp. 35-37). Hurnblad failed to get off ground zero in discharging this burden. All he can talk about in his argument and statement of the case is that *Knight* was incompetent. But *Knight* was not hired by Foster. Foster was not charged with negilgence regarding *Knight*. The question presented was: Did Foster negligently select *Transport Supply* as an independent contractor? (R. 164 & 180) Not one iota of evidence did Hurnblad introduce concerning Transport Supply's antecedent activities. He brought nothing into court which would indicate any bad habits by Transport Supply, but he now asks this court to hold that Foster should have known all about this nonexistent incompetent activity.

B. NO SHOWING THAT FOSTER VIOLATED ANY STATUTE OR THAT ANY STATUTORY VIOLATION WAS THE PROXIMATE CAUSE OF THE ACCIDENT

1. HURNBLAD PRESENTS NOTHING TO SHOW A VIOLATION OF THE STATUTE

Hurnblad opens this portion of his brief with a groundless statement. He states (Ans. Br. p. 17):

> "Appellant's violation of this statute [49 U.S.C.A. §322(c)] is practically conceded. (12D; R. 114; Tr. 509, 536)"

Hurnblad, by this, indicates that he has failed to take cognizance of Appellant's Brief, pp. 45-51, where it is most emphatically and clearly shown that Hurnblad did not come forward with even a scintilla of evidence which would indicate that Foster did knowingly violate the statute. In support of this untenable statement Hurnblad cites to Exhibit 12D which showed only that Transport Supply and Sim Knight were not I.C.C. approved. He also cites to page 114 of the Record which contains some eleven admitted facts, none of which in any way treat of what knowledge Foster had. Hurnblad's reference to page 509 is completely opaque. His reference to page 536 is equally obscure, for here Mr. Baker, a salesman for Foster, testified in response to a question from the court that he had no way of knowing whether Transport Supply was regulated, and that he would not knowingly ship by an unregulated carrier.

2. HURNBLAD PRESENTS NO COGENT ARGUMENT THAT HE OR HIS INJURY WERE CONTEMPLATED BY THE STATUTE

Hurnblad quotes a portion of the preamble to the 1940 Amendment to the Interstate Commerce Act. Taken out of context in the manner presented by Hurnblad, it appears that the one prime overriding purpose of the Interstate Commerce Act was safety.[4] However, examination of the full body of the preamble shows that it is not that simple.[5] A casual reading reveals some seven purposes, and a second reading reveals a total of thirteen. In addition, examination of these reveals that some of the purposes are not only not supplementary or complementary to each other, but are in direct conflict.[6]

From this examination it becomes clear that the Transportation Policy of the Congress is a many jumbled thing. Perhaps one of the tertiary or quaternary purposes of the statute was as Hurnblad alleges, but the primary purpose for the Interstate Commerce Act was pointed out over seventy-five years ago in *I.C.C. v. Baltimore & O. R.R.*, 145 U.S. 263 (1892):

> "The principle objects of the Interstate Commerce Act were to secure just and reasonable

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[4]Hurnblad fails to acknowledge or answer the line of cases from *I.C.C. v. Baltimore & O. R.R.*, 145 U. S. 263 (1892) to *New York v. United States*, 331 U. S. 284 (1947) (cited and quoted at pp. 55-57 of App. Br.) in which the Court consistently held that the injury to be prevented by the statute was economic injury and the group to be directly benefited was the shipping industry.

[5]The entire text of the Preamble is set forth in the Appendix.

[6]Some of the more obvious conflicts include the administration of the Act to recognize inherent advantages of each mode of transportation while at the same time attempting to preserve all the methods of transportation. In addition, economical and efficient service may very definitely be in conflict with fair wages and equitable working conditions.

charge for transportation; to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations, or localities; to inhibit greater compensation for a shorter and for a longer distance over the same line; and to abolish combinations for the pooling of freights."

The ill to be cured was economic in nature; those to be protected are those in the shipping field.

3. HURNBLAD PRESENTS NOTHING TO SHOW A PROXIMATE CAUSAL CONNECTION BETWEEN THE ALLEGED VIOLATION AND THE INJURY

Hurnblad takes a full page of his brief (Ans. Br. pp. 18-19) to work up to the rule that there must be a proximate causal relationship between a statutory violation and injury before liability will attach. This basic tort principle is set forth by Foster at pp. 57-58. Using this elementary conclusion as a springboard, Hurnblad then makes the speculative leap to the conclusion that if the proper rate had been charged the accident would not have occurred. He argues that if the proper rate were paid that it would follow as a certainty that the equipment would have been adequately and safely maintained.[7] This is nonsense. Hurnblad forgets that the carrier is free to do with the income as he pleases. The payment of the proper tariff by the shipper is no guarantee that the carrier will not use it to play the stock market or buy

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[7]For all intents and purposes this was the same argument made to the court in *Barsh v. Mullins*, 338 P.2d 845 (Okla. 1959). See pp. 64-65 of App. Br. for the unsympathetic response this argument elicited from the court.

diamond bracelets rather than safety. The proximate cause of the accident was the failure of the driver to either check his brakes or to properly adjust them during the trip. In any event, it is clear that the accident occurred, not because Foster engaged an uncertified carrier, Transport Supply, but because the driver of the truck hired by Transport Supply failed to check his brakes.

III. REPLY TO HURNBLAD'S ANSWERING ARGUMENT

A. A PARTY INJURED BY THE NEGLIGENCE OF AN INDEPENDENT CONTRACTOR WHO HAD A CONTRACT WITH ANOTHER INDEPENDENT CONTRACTOR, WHO HAD A PREVIOUS CONTRACT WITH A THIRD INDEPENDENT CONTRACTOR, HAS NO CLAIM AGAINST THE THIRD INDEPENDENT CONTRACTOR FOR THE NEGLIGENCE OF THE FIRST INDEPENDENT CONTRACTOR

Hurnblad attempts to show that this issue is not procedurally before this court. All that need be said in this regard is that the independent contractor status of Knight was brought to the trial court's attention in Foster's requested instruction No. 11 (R. 48) which was refused. This was preserved for appeal by Foster on page 919 of the Transcript and included as Specification of Error No. 7 (App. Br. p. 15). This particular question was also brought to the trial court's attention by Hurnblad himself. In his requested instruction No. 27 (R. 90) he inferred that Knight, not Transport Supply, was the independent contractor of Foster. However, the court refused this erroneous construction and gave a correct

charge, stating that Transport Supply was the independent contractor of Foster (R. 164 and 180). To this Hurnblad took exception (911) but did not assign it as error.

Turning to the merits, Hurnblad then argues in succession that Knight was not an independent contractor and even if he were, it is of no moment. On the first point Hurnblad chooses to ignore the case law on this question. The definitive case, cited by Foster at page 31 of Appellant's Brief, which Hurnblad refused to discuss or even acknowledge is *Hollingbery v. Dunn,* 68 Wash.2d 75, 411 P.2d 431 (1966). This case lays out the criteria by which the question of independent contractor is to be resolved, and it directs conclusively that Knight was an independent contractor of Transport Supply.

Hurnblad next contends that even if Knight were an independent contractor to Transport Supply, it would not change the situation since "a *franchised carrier* may not delegate its duties to an independent contractor." For the first twenty pages of his brief, Hurnblad has maintained that Transport Supply was not franchised.[8] Now Hurnblad attempts to reverse his field, and contends that even if Transport Supply was not franchised, it should have the detriments of a franchised carrier, but none of the benefits. This argument groans under the weight of its own hypocrisy. The California case cited by Hurnblad merely restates the common law rule that one who does in fact hold a franchise from the state cannot delegate the liabilities concomitant with it. Hurnblad's

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[8]Hurnblad even went so far as to accuse Foster of bad faith for allegedly insinuating that it might not have been proven that Transport Supply had no certificate.

argument along this line does not even measure up to a good make-weight argument.

Hurnblad sums up by stating that Foster's employees "accepted Sim Knight's truck by supervising the loading operation". (Ans. Br. 21) And from this he concludes:

> "Appellant's negligence, in part, is predicated upon that direct sanction of defendant, Sim Knight, and the use of his unsafe truck to haul appellant's goods." (Ans. Br. 22)

This is patently erroneous, this theory was never submitted to the jury. Foster was never charged with negligently engaging Sim Knight. The only issue submitted to the jury on negilgent engagement of an independent contractor referred to the engagement of Transport Supply Company. (R. 164 and 180)

The net result is that Hurnblad has failed to present any argument to refute Foster's argument that the negligent acts of Knight which caused the harm were too remote in time, space and contractual relationship from Foster to result in any liability to Foster.

B. THE EVIDENCE FAILED TO ESTABLISH ANY NEGLIGENCE IN FOSTER'S CONTRACTING WITH TRANSPORT SUPPLY

Come forward with just one example of antecedent incompetency on the part of Transport Supply. This was the flat challenge laid down by Foster in his opening brief, pp. 41-43. How did Hurnblad reply? Did he point triumphantly to one miniscule piece of evidence overlooked by Foster? No, he did not. Why?

Because he could not. Rather, he dredged the transcript for any reference to the incompetency of Knight (See ft. 2 *supra,* and Argument *supra* p. 9). But the question was: Did Foster negligently select Transport Supply as an independent contractor? (R. 164 & 180). Hurnblad never addressed himself to the question.

Hurnblad presents his answer to Foster's twelve-page argument on this issue in just one page. But in that one page he manages to engage in the irrelevancies of illegal rates, interject emotional phrases such as " 'fly-by-night' motor carriers," and ignore completely the Washington cases on this issue. It is this last characteristic which is most disconcerting. Foster set forth in his brief (pp. 34-38) and in this brief (p. 9) the line of Washington cases which come to grips with this issue. However, Hurnblad does not even attempt to meet and argue them. Appellant demanded that Hurnblad show one instance of antecedent incompetence as required by the Washington rule, but Hurnblad ignores this and asks for relief, his burden of proof notwithstanding. The review of Hurnblad's case presented in Appellant's Brief at pp. 41-43 shows clearly that Hurnblad did not introduce one witness who could testify as to any instance of incompetence by Transport Supply.[9]

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[9]Hurnblad's attempts to distinguish the cases of *Moore v. Roberts,* 93 S.W.2d 236 (Tex. Civ. App. 1936) and *Mooney v. Stainless, Inc.,* 338 F.2d 127 (6th Cir. 1964) are so transparent they require little answer. Suffice to say that in *Moore* liability was attempted to be imposed on a shipper who sent goods via an independent contractor who did not have a certificate, who used an uncertified driver, and whose bad brakes caused the accident. It would be hard to find a case more clearly on all fours on all relevant facts. *Mooney* involved a plaintiff who was thrown out because she failed, like Hurnblad, to produce any evidence of any antecedent negligence or incompetence on the part of the independent contractor. Both cases are discussed at length in App. Br. pp. 38-41 and 45.

C. THE EVIDENCE FAILED TO ESTABLISH ANY NEGLIGENCE BY FOSTER REGARDING SECTION 322(c) WHICH WAS A PROXIMATE CAUSE OF PLAINTIFF'S INJURY

Hurnblad makes the remark that neither common sense nor case law support the proposition that the prime body responsible for enforcing the Interstate Commerce Act is the I.C.C. (Ans. Br. p. 23). The inference from this argument is that the duty to enforce the Act falls on the shipper, Foster; that it has a duty to ascertain that the truck driver is properly licensed, that he complies with the health requirements of the I.C.C., that his vision meets the I.C.C. minimums, that the numerous brakes and brake drums on the tractor-trailer rig comply with the detailed I.C.C. regulations, that all the equipment on the truck complies with the detailed I.C.C. regulations (which regulations run to 78 pages, Ex. 9, which was used in part in the instructions R. 157-158), that numbers, if any, on the truck are real numbers issued by the I.C.C., that any permit has not expired, that the haul in question is within the tariffs filed with the I.C.C. (which tariffs sometimes run to hundreds of pages and thousands of rates (35)). All of this and more, according to the appellee, devolves upon Foster as a shipper, and if to Foster, then to every shipper, including the housewife shipping household goods from San Leandro, California to Bellevue, Washington.

Hurnblad's concept of common sense and case law notwithstanding, 49 U.S.C.A. §43 provides:

> "Whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage

> . . . of freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the District Court of the United States sitting in equity having jurisdiction. . . ."

Hurnblad then goes on for some three pages about what might have been. He in no way acknowledges that his burden under §322(c) was not to prove "what might have been," but to prove what did in fact occur. As set forth in Foster's Br. pp. 46-51, the burden placed on Hurnblad was (1) to prove that Foster knew that Knight had no certificate *AND* (2) to prove that Foster knew that Transport Supply was charging less than the minimum rate. Under the regime of I.C.C. competition in this regulated sector of the economy is now conducted mainly in areas of service, availability and equipment. Price cutting and discriminations are no longer significant factors which a *shipper* must consider. Hurnblad also talks about the invoice which reflected Transport Supply's below minimum rates. Nowhere in his argument does he own up to the fact that none of the invoices were even received by Foster, prior to the shipment in question. (This was shown in detail at App. Br. p. 50). Hurnblad's contention is premised on retroactive notice which is not the law.

Hurnblad devotes only a four line footnote (Ans. Br. p. 25 ft. 16) to his argument that Foster knew that Knight had no certificate. This is ironically symbolic since on the scale of events this de-minimis reference corresponds to the amount of contact which Foster had with Knight. Knight pulled into the yard, was loaded, and was on his way. What

else transpired at this brief encounter was not shown by Hurnblad. He can only sit and speculate as to what might have been. However, what might have been is not evidence, and without evidence Hurnblad cannot proceed.

Thus, in answer to Foster's two-pronged argument of no showing of knowledge, Hurnblad discusses invoices and what might have been in answer to one prong, and presents absolutely no argument whatsoever to refute the other prong.

This would be an appropriate point for Hurnblad to answer Foster's argument that the statute is inapplicable to Hurnblad (App. Br. pp. 51-57). However, Hurnblad chooses to eschew any reference to the United States Supreme Court cases which have held consistently over a 75 year period that the injury to be prevented is economic not personal, and the groups to be protected are those directly injured by price wars, rebates, discriminations, and extortions. (See *New York v. United States,* 331 U.S. 284 (1947); App. Br. pp. 51-57; App. R. Br. pp. 11-12).

On page 27 of his brief, Hurnblad finally turns and faces two of the many cases which directly contradict his proffered legal theories. However, rather than meet and argue their basic rationale, he attempts to distinguish them. These cases[10] were cited by Foster because they involve attempts by third parties to hold a shipper liable for the negligence of an uncertified motor carrier. In both cases the court held as a matter of law there could be no causal connection between shipping on an uncertified carrier and any

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[10]*Marion Machine, Foundry & Supply v. Duncan,* 187 Okla. 160, 101 P.2d 813 (1949); *Barsh v. Mullins,* 338 P.2d 845 (Okla. 1959). See App. Br. pp. 63-65 for an examination of these cases.

injury which the carrier's negligence might produce. Hurnblad attempts to distinguish these cases on the extraneous grounds that they allegedly did not involve a below the minimum tariff rate and that Oklahoma does not hold a principal liable for negligent selection of an independent contractor. As for the former, the obvious reason that no mention of the tariff was made was that it was absolutely irrelevant on the issue of proximate cause. It is just as irrelevant here, but Hurnblad continues to wave his flag. The second ground for distinction is completely specious. In the first place, the language of the court quoted by Hurnblad shows no more than that the issue has not been presented to the court. It is an old tradition of common law, albeit not always followed, that a court wait for the question to come to it before it gives an answer. But even if that were not the situation, the cases are still valid for the proposition for which they were cited because the question of negligent selection of an independent contractor is irrelevant to this issue.[11]

At this point in his brief (p. 28) Hurnblad makes a most groundless charge. In the middle of his attempts to rationalize the jury's finding of proximate cause, he interjects the completely erroneous and extraneous allegation that Foster is contending that a principal is not liable for negligent selection of an independent contractor. The entire matter of liability resulting from the employment of an incom-

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[11]Hurnblad also attempts to discredit *DeBord v. Proctor & Gamble Distrib. Co.*, 146 F.2d 54 (5th Cir. 1944) by alleging that the 5th Circuit there found the Oklahoma case of *Marion Machine* to be controlling. The 5th Circuit cited *Marion Machine* for the same reason Foster cited *DeBord*: the inherent basic rationale that there is no proximate causal relationship such that a shipper can be held liable for the negligence of an uncertified carrier. For a discussion of *DeBord* see App. Br. p. 59.

petent independent contractor was discussed *supra* at pp. 4-9; 15-16 and in App. Br. at pp. 33-45. Hurnblad's injection of this issue out or order indicates confusion on his part. (See App. Br. pp. 69-74).

Hurnblad concludes his argument on proximate cause with the statement that this case "is not akin to driving a car without a license."[12] He then goes on to draw the truly remarkable conclusion that if Transport Supply had been licensed, then the accident *"for certain"* would not have occurred.

As indicated in Foster's brief, there are no Washington cases on the precise question of proximate cause where a shipper has shipped on an unlicensed carrier. However, there are a number of Federal Court decisions[13] and state court decisions[14] which considered this precise issue. Five different courts in seven decisions came to the same conclusion: there is no proximate causal relationship between a shipper shipping on an uncertified carrier and any injury resulting from the negligence of the carrier. Hurnblad does not cite one case to the contrary.

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[12]Compare this with Hurnblad's statement on page 18, where he explains this whole issue in terms of driving a car without a license.

[13]*DeBord v. Proctor & Gamble Distrib. Co.*, 146 F.2d 54 (5th Cir. 1944); *Kenosha Auto Transp. Corp. v. Lowe Seed Co.*, 362 F.2d 765 (7th Cir. 1966); and *Hoover v. Allen*, 241 F. Supp. 213 (S.D.N.Y. 1965). These are discussed in Foster's Brief at pp. 59-62.

[14]*Bradley v. Chickashaw Cotton Oil Co.*, 184 Okla. 51, 84 P.2d 629 (1938); *Marion Machine, Foundry & Supply v. Duncan*, 187 Okla. 160, 101 P.2d 813 (1940); *Barsh v. Mullins*, 338 P.2d 845 (Okla. 1959). These were discussed at pp. 62-65 App. Br. Another case which reached this same conclusion was: *Newsome v. Dunn*, 103 Ga. App. 656, 120 S.E.2d 205 (1961). See also *Moore v. Roberts, supra*, ft. 9 and *Galentine v. Borglum*, 150 S.W.2d 1088 (Mo. App. 1941).

D. THE RIGHT TO A NEW TRIAL BECAUSE OF SPECIFIC PREJUDICIAL RULINGS

Hurnblad is able to cite only one case in support of his contention that the statute in question can be violated by negligence. This is the case of *United States v. Gunn,* 97 F. Supp. 476 (W.D. Ark. 1950). A careful reading of the opinion by the District Court Judge reveals that he simply ignored the plain meaning of the words "knowingly and willfully" and emasculated their effect in the statute. From the case it appears that all the United States did prove was negligent violation of Section 322 (a). However, the judge's attitude and designs were revealed when he stated (p. 480):

> "To permit the defendant to escape punishment would be against the policy of the law."

It is submitted that the cited case was wrongly decided and is authority for nothing. In addition, it should be noted that the case is not followed by any other court, but quite the contrary, the Federal Courts are unanimous in their conclusion that the statute cannot be violated by negligence. In addition to the cases cited in Appellant's Brief,[15] two cases cited by Hurnblad (Ans. Br. p. 24), also state the rule that this statute cannot be violated by mere negligence.[16]

The most fundamental error committed by the trial court was in its instruction on proximate cause (App. Br. pp. 74-76). The "but for" instruction given by

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[15]*Inland Freight Lines v. United States,* 191 F.2d 313 (10th Cir. 1951); *United States v. Joralemon Bros., Inc.* 174 F. Supp. 262 (E.D.N.Y. 1959) These appear on pages 68-69 of Appellant's Brief.

[16]*Steere Tank Lines, Inc. v. United States,* 330 F.2d 719 at 721 (5th Cir. 1963); *United States v. E. Brooke Matlack, Inc.,* 149 F. Supp. 814 at 820 (D.Md. 1957).

the court threw off the jury's consideration of both issues here involved. The question presented to the jury by this instruction was: If Foster had not employed Transport Supply would the accident have still occurred? To which the obviously simple answer was no: if Foster had not employed Transport Supply, then Transport Supply would not have employed Knight who would not have been on the road.

Hurnblad can announce only his bare conclusion that the instruction was correct. He makes no attempt to rationalize the court's instruction in light of the Washington case cited[17] which states in clear unequivocal language that an instruction on proximate cause which defines proximate cause under the "but for" concept does not state the Washington rule. Hurnblad attempts to characterize the *Meher* case as concerned with superseding negligence, but a reading of the quotation set forth on page 75 of Foster's brief reveals that the object of discussion was the difference between actual cause and proximate cause. It is clear that the court gave a faulty definition for the ultimate question. No verdict can stand when premised upon such a grossly inaccurate statement of the applicable law.

Foster raised four other trial errors. Two of these, admission of evidence of what a certified carrier would look for,[18] and the charge which made motor carrier safety statutes and regulations applicable to a shipper,[19] were not answered by Hurnblad and

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[17]*Meher v. Easterling*, ...Wash.2d ....., 71 Wash. Dec. 2d 102, 426 P.2d 843 (1967).

[18]App. Br. p. 73

[19]App. Br. p. 74

they stand unchallenged as evidence of the necessity of a new trial.

The remaining two errors, the admission of Mr. Landsburg's bloody reputation of uncertified carriers,[20] and the repetitive admission of evidence as to illegal rates,[21] were mentioned by Hurnblad, but were not answered. Hurnblad attempts to argue that Mr. Landsburg said no more than Mr. Baker. But Mr. Baker did not create the impression that Foster and Transport Supply got together for an illegal deal in which they cared not how many battered and broken bodies might be strewn along the highway; he did not tell the jury here is your chance to help the I.C.C. with a problem by laying liability to this shipper. Baker said none of these things, but Landsburg did. And, because of the admission of this irrelevant testimony Foster suffered grievous prejudicial harm. Hurnblad still contends that the testimony was not offered to show that any of the parties at trial was a bad guy. The fact that this was the way it came out when Hurnblad introduced it notwithstanding, Hurnblad made no effort, nor did the court, to instruct the jury that Mr. Landsburg was only testifying about what Foster should know, not what this former government official felt Foster actually did do. The singular impression which the jury could draw from this testimony was that here was real proof that Transport Supply and Foster were in an illegal deal together and we should get them for it.

Hurnblad completely skirts the issue raised on the admission of repetitive testimony of illegal rates. He

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[20]App. Br. pp. 69-72

[21]App. Br. pp. 72-73

discusses all the other reasons he had for introducing the testimony of Mr. Connor and Mr. Stewart, but at no point does he answer why during the course of the trial he asked on ten different occasions whether the rate charged by Transport Supply was legal. He does not tell why he kept hammering, hammering and hammering away on the fact that Transport Supply did not charge the legal minmium. The reason he does not tell is because this was the manifestation of his confusion tactic. The only purpose for going over and over and over the same ground was to magnify this aspect to such an extent that the jury would be swept along in the confusion.

CONCLUSION

Hurnblad has failed to properly answer any of the arguments or cases raised by Foster. Because of the errors of the trial court on the matters of admissibility and the charge to the jury, the judgment below must be reversed. Because of Hurnblad's failure to carry his burden of proof, his first theory must be stricken, and the judgment below based thereon reversed. Because of Hurnblad's failure to sustain his burden of proof and his failure to show applicability of the statute, his second theory must be stricken and the judgment below based thereon, reversed.

Respectfully submitted,

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Appendices

PREAMBLE TO THE 1940 AMENDMENT TO THE INTERSTATE COMMERCE ACT

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; — all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."